NO. 20728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS BERNARD KAPLAN AND ALBERTO BERUMEN

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

ALEXANDER, INMAN & FINE
8400 Sunset Boulevard
Los Angeles, California 90069

Attorneys for Appellants
BERNARD KAPLAN and
ALBERTO BERUMEN

NO. 20728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS BERNARD KAPLAN AND ALBERTO BERUMEN

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

ALEXANDER, INMAN & FINE
8400 Sunset Boulevard
Los Angeles, California 90069

Attorneys for Appellants
BERNARD KAPLAN and
ALBERTO BERUMEN

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

Rules

NO. 20728

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS BERNARD KAPLAN AND ALBERTO BERUMEN

STATEMENT OF CASE

On January 13, 1965, the United States commenced this action by filing a grand jury indictment in the United States District Court for the Southern District of California, Central Division. Said indictment was in five counts. Count One of the indictment charged appellants Bernard Kaplan and Alberto Berumen together with one Ronald N. Reinhardtsen of conspiring together to pass, utter, publish, or attempt to do so, counterfeited obligations of the United States in violation of Title 18, United States Code, Section 472. All of said parties were subsequently acquitted on this Count (Rep. Tr. p. 372, lines 11-12). Counts Two and Four of the

indictment charged appellant Berumen with unlawfully passing a counterfeit Federal Reserve Note in violation of Title 18, United States Code, Section 472; while Count Three made the same charge against defendant Reinhardtsen and additionally charged appellant Kaplan with aiding, abetting, counseling, inducing and procuring the commission of defendant Reinhardtsen's alleged offense. Count Five of the indictment charged appellant Kaplan and defendant Reinhardtsen with a further violation of Title 18, United States Code, Section 472 - i.e., possessing and concealing with intent to defraud six Federal Reserve Notes, all of which were counterfeit.

Following the posting of bail by appellants and by defendant Reinhardtsen, on January 25, 1965, appellants were arraigned before the Honorable Charles H. Carr, District Judge. At the time of arraignment both of appellants were represented by Howard E. Beckler. Appellants' respective pleas, however, were continued until February 8, 1965, at which time appellant Kaplan pled not guilty to Counts One, Three, and Five of the indictment; while defendant Berumen pled not guilty to Counts One, Two and Four thereof. The matter was also set for trial at this time and appellants and defendant Reinhardtsen were given permission to file any motions they deemed necessary.

Subsequently and on or about March 4, 1965, a Motion to Suppress certain evidence was filed on behalf of defendant Reinhardtsen, which motion was subsequently joined in on behalf of defendant Kaplan (see Rep. Tr. p. 15, lines 6-23). On or about March 9, 1965, a Motion for Discovery and Inspection was filed on behalf of

appellants. The aforedescribed Motion to Suppress was opposed by the government, while the Motion for Discovery and Inspection was partially opposed.

On March 15, 1965, the Honorable Jesse W. Curtis, District Judge, ordered the Motion to Suppress Evidence continued until the time of trial, and granted in part and denied in part appellants' Motion to Inspect.

On March 29, 1965, the date originally set for trial in this matter, appellants' attorney, Howard E. Beckler, made a Motion for a continuance in order to give him time to be relieved as counsel for appellant Bernard Kaplan on the grounds that there was a definite conflict of interest between appellants Kaplan and Berumen. Following proddings of the Court, however, attorney Beckler agreed to arrange for new counsel for appellant Kaplan and to have said counsel prepared for trial on the morning of the following day, March 30, 1965.

On this later date trial was in fact commenced before the Honorable William J. Lindberg, all parties to the action having waived trial by jury and special findings of fact. Despite Mr. Beckler's prior representation to the Court that he could not represent both of appellants because of the conflict in their respective interests and that he would have new counsel at the time of trial for appellant Kaplan, Mr. Beckler in fact represented both of appellants at the instant trial, after explaining to the Court that he believed that the conflict in question no longer existed.

During the course of the trial neither appellants nor

defendant Reinhardtsen testified in their own behalf. Following denial of the Motion to Suppress Evidence and conclusion of the remainder of the trial, the Honorable William J. Lindberg found that none of the defendants were guilty as to Count One of the indictment (i.e., there was no conspiracy); that defendant Reinhardtsen was not guilty as to Counts Three and Five of the indictment; but that appellant Alberto Berumen was guilty as to Counts Two and Four of said indictment, while appellant Bernard Kaplan was guilty as charged in Counts Three and Five thereof. The time set for sentencing was continued to April 13, 1965, pending a presentence report.

On this later date, appellant Kaplan was sentenced to a term of three (3) years each on Counts Three and Five of the indictment, which sentences were to run concurrently under Title 18, United States Code, Section 4208(a)(2). Appellant Berumen was also sentenced to three (3) years each on Counts Two and Four of the indictment to run concurrently under said Section. Subsequently and also on April 13, 1965, appellants Berumen and Kaplan filed Notices of Appeal in the instant matter, as well as application for bail pending appeal, which applications were granted. Appellant Berumen's Notice of Appeal was filed in propria persona.

Thereafter, on May 28, 1965, a Substitution of Attorneys, substituting Maurice C. Inman, Jr. in place of Howard E. Beckler was filed on behalf of appellants. All other documents necessary to perfect this appeal, including the designation of record on appeal,

were thereafter filed with this Court.

STATEMENT OF FACTS

A. Pre-Trial Proceedings.

As heretofore indicated, at all times following the arraignment of appellants on January 25, 1965, and up to the Substitution of Attorneys herein following the completion of trial and sentencing, appellants were represented jointly by Howard E. Beckler, attorney at law.

Prior to the time of trial herein and on March 15, 1965, appellants' Motion for Discovery and Inspection of certain documents and statements in the possession of the government was heard by the Honorable Jesse W. Curtis. Following argument on the Motion, Judge Curtis denied appellants the right to inspect the statements requested in numbers 5, 6 and 7 of said Motion (Rep. Tr. p. iv, line 25, p. v, lines 1-2). The statements so requested were any and all statements made by appellants Kaplan and Berumen and/or defendant Reinhardtsen at any time or place to officers of the United States with respect to the subject matter of the instant case, whether or not reduced to writing and/or signed by any of said defendants, as to which some form of recordation, note, or memorandum existed incorporating, embodying or reproducing the substance and content of said statement or statements. The statements of appellants were requested on the grounds that they were "unable to recall and relate to their counsel the full substance or

content of their statements and accordingly counsel requires the items and objects . . . to be able to evaluate defendants' [appellants'] positions with respect to this case, advise them concerning same, and prepare and develop their defense thereon." (See Motion for Inspection and Discovery, para. (5).)

On the date originally set for trial, March 29, 1965, attorney Beckler made a Motion on behalf of appellants - specifically appellant Kaplan - for a continuance predicated upon the grounds that on Saturday afternoon of the weekend immediately preceding trial (trial being held on Monday) he had had a final interview with both of appellants, and at that time was provided with certain information not previously given to him by defendant Kaplan, which established that there was a definite conflict of interest, at least in said attorney's mind, between the two appellants (Rep. Tr. p. viii, line 15 - p. ix, line 2). Attorney Beckler further informed the Court that he made this Motion as an officer of the Court; that the Motion was not a "dilatory tactic" on his part; that the information was not something he could have previously ascertained; and that he was sure that such information would "inhibit" appellants' testimony (Rep. Tr. p. viii, line 25 - p. x, line 8).

Thereupon the Court inquired of attorney Beckler and appellant Kaplan whether a continuance until Thursday would aid in permitting appellant Kaplan to obtain new counsel. Both attorney Beckler and appellant Kaplan, however, questioned whether it would be possible to obtain and prepare new counsel by said date (Rep. Tr. p. x, lines 9-23). When counsel for the prosecution

indicated that the government was opposed to a continuance on the grounds that the same would greatly inconvenience a number of its witnesses, the Court then set trial for Thursday, April 1, 1965. Attorney Beckler, however, after first stating that he had other matters at that time and was otherwise engaged up to April 19, 1965 (see Rep. Tr. p. xiii, lines 5-13; p. xiv, lines 20-22), further stated that if the matter could not be continued until April 19, he would arrange for appellant Kaplan to have "competent prepared counsel" who would answer ready "today" [March 29, 1965] (Rep. Tr. p. xiv, lines 16-21). Thereupon the Court set the matter for trial on the following morning, March 30, 1965.

B. Evidence and Testimony at Trial.

1. Jury Waivers.

At the outset of the trial in the instant matter, appellants and defendant Reinhardtsen all orally and in writing advised the Court that they desired to proceed at trial without a jury. Both appellants Kaplan and Berumen stated that they had given the matter full consideration for a substantial period of time before making such waivers. Both the government's attorney, Mr. Balaban, and Mr. Beckler also consented to such waivers (Rep. Tr. pp. 1-9). At this stage in the proceedings, upon request of Mr. Balaban, attorney Beckler notified the Court that he believed the conflict problem which he had earlier raised was resolved because there was no longer a "contingency of a jury trial". Appellants concurred with

attorney Beckler's statement, stating that they had discussed the matter with him (Rep. Tr. p. 12, line 16 - p. 14, line 5).

2. Evidence Offered On Motion to Suppress.

Consideration of appellants' and defendant Reinhardtsen's Motion to Suppress in the instant case was deferred until time of trial. The evidence which appellants and defendant Reinhardtsen were attempting to suppress consisted of six (6) $100 Federal Reserve notes which were purportedly counterfeit and the envelope in which the notes had been found. Said evidence had assertedly been found in the trunk of a 1963 Chevrolet automobile allegedly used by defendant Reinhardtsen.

Since the affidavits offered in support of the Motion and the government's testimony in this matter conceded the fact that no warrants had ever been issued for the arrest of either of appellants or defendant Reinhardtsen, nor had a search warrant ever been obtained to search said Chevrolet automobile, the government, by means of testimony of agent Robert L. Tomsic of the Secret Service, sought to establish legality of the seizure of the evidence in question.

Agent Tomsic testified, for purposes of establishing probable cause for the seizures and as evidence solely with reference to the Motion to Suppress (see Rep. Tr. p. 159, lines 12-16; p. 176, line 1 - p. 178, line 16), as follows:

On December 18, 1964, he had received a note to the effect that the Secret Service had received a call from the United

California Bank to the effect that the bank had received a purportedly counterfeit $100 Federal Reserve note which had been deposited to the account of G. R. Kirk Company in Los Angeles and that an employee from the Kirk Company had reported that the note had been given him by an individual who was operating a Christmas tree lot in Hollywood, California. The note had been presented for payment of Christmas trees, and the purchaser thereof was apparently driving a white 1963 or 1964 Chevrolet (see Rep. Tr. p. 162, line 9 - p. 164, line 4). On the following day agent Tomsic reportedly became aware that a person by the name of Alberto Berumen had been arrested by the Los Angeles Police Department for attempting to pass a counterfeit $100 Federal Reserve note and that Mr. Berumen operated a Christmas tree lot in Hollywood, California. Subsequently on the same day agent Tomsic and agent Hess of the Secret Service took appellant Berumen into custody and ultimately went to the Christmas tree lot and then to the G. R. Kirk Company. Agent Tomsic went into the Kirk Company office at which time he was purportedly informed that the man who had given the allegedly counterfeit note for the previous Christmas tree purchase was then leaving the lot. Agent Tomsic noted that the individual referred to was seated in a white 1963 Chevrolet,and he then immediately proceeded outside to said automobile, assertively identified himself as a Secret Service agent, and requested the occupant to come back inside the office with him.

The occupant, defendant Reinhardtsen, identified himself, admitted he had used a $100 bill to pay for certain purchases at the

G. R. Kirk Company, but did not know the identity of the individual from whom he had received the bill, except that it was a customer at his Christmas tree lot; denied any knowledge that he had given a counterfeit bill; requested information from agent Tomsic as to whether he was under arrest; was then searched by agent Tomsic; and was, at this point, apparently told the next statements which he made could be used against him. When questioned about the Chevrolet automobile which was allegedly parked immediately adjacent to the office, defendant Reinhardtsen purportedly stated that the automobile belonged to a "Bernard Kaplan" and that Mr. Kaplan had been driving him the day on which the $100 bill had been passed (Rep. Tr. p. 172, line 1 - p. 173, line 19).

Agent Tomsic further testified that defendant Reinhardtsen was then placed in the Federal agents' automobile along with appellant Berumen and that he, agent Tomsic, took the keys to the Chevrolet automobile, and after being informed that if said automobile was to remain on the Kirk Company premises, it would have to be moved out of the way, drove the automobile to a spot at the end of the lot, made a brief search thereof, and locked it. Agent Tomsic, at this time, allegedly informed defendant Reinhardtsen that the Chevrolet automobile "was going to be seized as the car had been used to carry a $100 counterfeit note" (Rep. Tr. p. 174, lines 1-15).

Subsequently, agents Hess and Tomsic, together with appellant Berumen and defendant Reinhardtsen proceeded to the Los Angeles office of the Secret Service, and at some time

thereafter the keys to the aforementioned Chevrolet automobile were allegedly given by agent Tomsic to two other members of the Secret Service who were to pick up the automobile and bring it to the federal garage where they were to search it and then return the keys to agent Tomsic (Rep. Tr. p. 174, line 17 - p. 175, line 2). Further testimony elicited from agent Tomsic was to the effect that on December 20, 1964, he personally searched the automobile at the federal garage and discovered in a box located in the trunk thereof the envelope and six $100 Federal Reserve notes which were the subject of the Motion to Suppress.

Other material testimony which was offered and which bears upon said Motion was to the effect that the bill which had been passed at the Kirk Company lot on December 17th in payment for Christmas trees had not been examined by any Secret Service agents or any other counterfeit experts until December 22nd (see Rep. Tr. p. 132, line 17), and that the method which had been used by the United California Bank to ascertain whether the bill was counterfeit was merely that the numbers thereon matched a list of purportedly counterfeit bills which was issued to branches of the bank by its operations office (Rep. Tr. p. 128, line 23 - p. 129, line 7). No investigation was made prior to the 22nd which would tend to show that the note in question was not the real note which had been used as a basis for counterfeit copies.

3. Evidence Offered at Trial on Substantive Issues.

There was evidence offered at trial to the effect that on December 6, 1964, a counterfeit $100 Federal Reserve note was passed at the Food Giant Market located at Hollywood Boulevard in Hollywood, California and that appellant Berumen had allegedly passed said counterfeit note. Additionally, evidence was offered to the effect that on December 19, 1964, appellant Berumen had also passed a counterfeit $100 Federal Reserve note to an employee of Ralph's Market located on Sunset Boulevard in Los Angeles, California.

Other evidence offered at trial tended to show that on December 17, 1964, defendant Reinhardtsen had passed a counterfeit $100 Federal Reserve Note to an employee of the G. R. Kirk Company in downtown Los Angeles; that defendant Reinhardtsen was subsequently arrested by Agent Tomsic on December 19, 1964, at the Kirk Company lot; that the automobile defendant Reinhardtsen had in his possession at the time of arrest was sometime thereafter moved to the federal garage; and that on December 20, 1964, Agent Tomsic discovered six (6) counterfeit $100 Federal Reserve Notes located in an envelope in the trunk of said automobile. The notes and envelope in question were admitted into evidence following denial of appellants' and defendant Reinhardtsen's Motion to Suppress and over their objections to the introduction of said evidence (Rep. Tr. p. 318, line 7 - p. 319, line 12).

Other evidence offered was to the effect that appellant Kaplan was apparently with defendant Reinhardtsen at the Kirk

Company lot on December 17, 1964, when the purchase of trees was made with a counterfeit $100 Federal Reserve Note; that the Chevrolet automobile in which the six (6) counterfeit notes and envelope heretofore mentioned had been discovered was apparently leased to and/or in the general possession of appellant Kaplan; and that on December 20, 1964, subsequent to the search of said car and discovery of said evidence, appellant Kaplan acted suspiciously while attempting to remove certain of his personal property from said Chevrolet automobile.

ARGUMENT

I

APPELLANTS WERE DEPRIVED OF "ASSISTANCE OF COUNSEL" WITHIN THE MEANING OF THE SIXTH AMENDMENT TO THE CONSTITUTION DUE TO AN INHERENT CONFLICT WHICH EXISTED WITH RESPECT TO EACH OF THEIR INTERESTS.

It is well established that the right to counsel in criminal cases has a high place in the scheme of procedural safeguards of our courts and that it is the solemn duty of the Trial Judge to make certain that representation of an accused by counsel is not an empty gesture, but is the fulfillment of the spirit and purpose of the Constitutional Mandate.

Cicenia v. LaGay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958);

Gadsen v. United States, 223 F.2d 627, 96 U.S. App. D.C. 162 (1955);

United States Constitution, Sixth Amendment.

Moreover, as a defendant in Federal Court is entitled under the Sixth Amendment to the Constitution to the assistance of counsel for defense, where he is able to obtain counsel for himself he must be given reasonable time and a fair opportunity to secure such counsel of his own choosing.

United States v. Bentvena, 319 F.2d 916 (4th Cir. 1963), cert. denied, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1964).

The Constitution assures a defendant effective representation by counsel whether the attorney so chosen is one of defendant's own choosing or is Court appointed.

Craig v. United States, 217 F. 2d 355 (6th Cir. 1955);

Holland v. Boles, 225 F. Supp. 863 (D. C. West Va. 1963).

Undivided loyalty of counsel is, of course, essential to due process, just as the right of assistance of counsel means effective assistance. There cannot be effective assistance if there is a conflict of interest or if reasonable opportunity to prepare for such representation has not been granted.

See: MacKenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960), Modified 289 F. 2d 928, cert. denied 368 U. S. 877, 82 S. Ct. 121, 7 L. Ed. 2d 78 (1961);

Linden v. Dickson, 287 F. 2d 55 (9th Cir. 1961);

United States v. Yodock, 224 F. Supp. 877 (D. C. Pa. 1963);

United States Constitution, Sixth and Fourteen Amendments.

Perhaps the leading case dealing with the right to counsel and the adequacy of representation thereby is that of Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), rehearing denied, 315 U. S. 827, 62 S. Ct. 629, 86 L. Ed. 1222 (1942). In Glasser, supra, the Supreme Court pointed out that "assistance of counsel" is guaranteed by the Sixth Amendment to the Constitution,

which contemplates that such assistance be untrammeled and unimpaired by a court and that a court should not permit one lawyer to represent defendants with conflicting or potentially conflicting interests.

See: Glasser v. United States, 315 U.S. 60, 76.

Factually what transpired in Glasser was that Glasser and several other defendants were accused of defrauding and attempting to defraud the United States. Glasser, an attorney, hired several attorneys to represent him in his defense. One of these attorneys was a Mr. Stewart. Another defendant, also an attorney, had a difference of opinion with his counsel during the time of trial and notified the court that he did not wish this counsel to proceed in his behalf at the trial, but rather desired other counsel. Thereupon the trial judge inquired of Mr. Stewart if he would represent the second defendant along with Mr. Glasser. Glasser, however, personally objected to the appointment on the grounds he "would like to have my [his] own lawyer representing me [him]" (315 U.S. 60, 69). After further discussion, Stewart agreed to represent both the other defendants and Glasser, the court making such appointment and there being no further objection from either Glasser or any counsel representing him. The Supreme Court, in reversing Glasser's conviction stated that it is,

> " . . . upon the trial judge [that] the duty of seeing the trial is conducted with solitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance

of counsel. This protecting duty imposes a serious and a weighty responsibility upon the trial judge of determining whether there is an intelligent and confident waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial judge, and it would be fitting and appropriate for that determination to appear upon the records [citation]." (315 U.S. 60, 71).

The Court concluded there had been no intelligent waiver of right to counsel in the case and that Glasser was denied "assistance of counsel", holding that the potential conflict of interest warranted reversal. In so holding, the Court laid down the guide line that some actual or potential conflict in interest must be shown before an inadequacy of counsel can be established. The Court stated, however, at page 76 that,

> "[t]he right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [citation]. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from . . . insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that diversion is brought home to

the court." (emphasis added).

See also:

Craig v. United States, supra, 217 F.2d 395 (6th Cir. 1955);

Holland v. Boles, supra, 225 F. Supp. 863 (D. C. West Va. 1963).

In the instant case, the record is clear that on March 29, 1965, at the original time for trial, attorney Beckler, appearing for both of appellants, moved for a continuance in order to permit appellant Kaplan adequate time to obtain new counsel due to a potential conflict of interest between appellants Kaplan and Berumen. Attorney Beckler informed the court as follows:

> "On Saturday afternoon of the past week, day before yesterday, I had a final interview with Bernard Kaplan and Mr. Berumen in my office. At this time I learned some information that was given me . . . by Mr. Kaplan that I did not previously possess which indicated to my mind . . . as an officer of this court, that there is a definite conflict of interest between the two defendants Beruman and Kaplan.
>
> "I might say, your Honor, that this is not a dilatory tactic . . . I am ready as far as Mr. Berumen and had I not learned this information I would be ready as far as Mr. Kaplan." (emphasis added) (Rep. Tr. p. viii, line 20 - p. ix, line 10).

Attorney Beckler went on to inform the court that "I cannot honestly and in good conscience represent both defendants" (Rep. Tr. p. ix, lines 16-17), and that,

> "This information was not something I could have obtained . . . and it will be paradoxical between Mr. Berumen and Mr. Kaplan.
>
> "It will inhibit their testimony and it creates, in short, conflict." (Rep. Tr. p. ix, line 24 to p. x, line 8).

When queried further concerning the conflict Attorney Beckler stated that the conflict arose apparently out of his ascertaining facts pertaining to certain statements Mr. Kaplan had previously made, which statements were "extremely essential to the defense of Mr. Berumen" (See Rep. Tr. p. xii, lines 1-14).

Subsequently, when the court refused to continue the matter beyond April 1, at 9:30 A. M. (See Rep. Tr. p. xiv, lines 20-22), attorney Beckler informed the court as follows:

> "Your Honor, I can arrange for Mr. Kaplan to have competent prepared counsel and we can answer ready today." (Rep. Tr. p. xiv, lines 16-18).

Mr. Beckler's refusal to have the matter continued until Thursday was apparently predicated upon his being engaged at that time as well as at all other times up to April 19, 1965 (See Rep. Tr. p. xiii, lines 8-13; p. xiv, lines 21-22).

The matter was accordingly set for trial on the morning of

the following day, March 30, 1965.

Examining the above described statements of Attorney Beckler in light of the aforementioned legal rules concerning "assistance of counsel", there would appear to be little question but that Attorney Becker, an officer of the court, had established from information provided to him by his clients that there was a definite conflict of interest should he continue to represent both of them. Although the court did voice some suspicion concerning the request for a continuance, it is clear from Attorney Becker's statements that he felt a genuine concern that there was such a conflict after new evidence had been furnished to him by appellant Kaplan and that this evidence would definitely inhibit the defense of appellant Berumen. Attorney Beckler was, of course, the only person in a position to make such determination, since he had the benefit of privileged disclosure by his clients to him. Accordingly, there is no question under the above facts that if Attorney Beckler had at this stage continued to represent appellants the record would unquestionably indicate that appellants were denied "the assistance of counsel" guaranteed by the Sixth Amendment because of said attorney's representation of potential conflict of interest.

Glasser v. United States, supra, 315 U.S. 60, 76.

As previously indicated, however, other proceedings did transpire. On the date reset for trial, March 30, 1965, court was convened without new counsel being substituted for either of appellants in place of Mr. Beckler. Thereafter, appellants both orally and in writing advised the trial judge that they desired to proceed

to trial without a jury. Both Mr. Kaplan and Mr. Berumen stated they had given the matter full consideration for a substantial period of time before making such waivers. After counsel also consented to such waivers, the court permitted same. It was at this stage of the proceedings that Attorney Beckler notified the court that he believed that the conflict problem which he had earlier raised had been resolved because there was no longer a "contingency of a jury trial". The court then inquired of appellants as follows:

"THE COURT: Very well, I will inquire of Mr. Kaplan, are you aware of that position?

"MR. KAPLAN: Yes, your Honor.

"THE COURT: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

"Mr. KAPLAN: Yes, we have resolved anything that might have come up.

"THE COURT: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

"MR. KAPLAN: Yes, I sure have.

"THE COURT: Mr. Berumen, I would like to ask the same thing of you. You understood this?

"MR. BERUMEN: Yes, we talked it out and it is all straightened out.

"THE COURT: You think now that without a jury trial there would be no occasion for any conflict

or any conflict of any moment?

"MR. BERUMEN: That is right.

"THE COURT: And you are quite willing at this time to proceed in trial, represented by Mr. Beckler, having in mind that he also represents Mr. Kaplan?

"MR. BERUMEN: Yes, sir." (Rep. Tr. p. 13, line 8 to p. 14, line 5).

Summarizing the testimony at trial dealing with the instant issue, it is clear that Attorney Beckler had knowledge of an actual conflict, stated he would procure new counsel for one of the appellants because of said substantial conflict, did not apparently procure such counsel, but instead stated to the court that the conflict had apparently been resolved because of the waiver of a jury trial. Appellants, relying on Attorney Beckler's advice, agreed to continue with him as their counsel. Under such circumstances the question before this Court is two-fold - i.e., namely (1) whether the actual or potential conflict described by Mr. Beckler on March 29, 1965, could be resolved by the waiver of trial by jury and (2) whether, if the conflict did still exist at this stage, appellants waived their right to now question same by reason of their statements to the court.

Dealing with this latter question first, it is well established that the ultimate issue as to whether a defendant competently waived his right to counsel is whether he knowingly and intelligently chose

to do so.

See: United States v. Smith, 337 F. 2d 49 (4th Cir. 1964).

From a brief perusal of both appellants' applications for setting of bail pending appeal it is clear that neither of appellants have any legal training or are capable of making legal decisions without the advice of counsel. Unquestionably, from their testimony they relied solely upon Attorney Beckler's advice. Under these circumstances there was certainly not an "intelligent, confident waiver" within the meaning of the Glasser case, supra, if in fact a conflict in interests did exist.

Turning to the question of whether the conflict in question was resolved by the fact that a jury trial had been waived, it seems inconceivable that there could be any testimony concerning statements of one of the appellants which would create a conflict of interest only in the event of a jury trial. In fact, Judge Lindberg even pointed out to appellants at the time of their jury waivers that where there are such waivers the trial judge sits as the trier of fact, instead instead of twelve separate triers of fact,and that the likelihood of conviction is just as great or greater at a trial by court as opposed to a jury trial (See Rep. Tr. p. vi, lines 3-13; p. x, line 3 to p. xi, line 7).

Although it can only be conjecture at this time as to the nature of the information conveyed by appellant Kaplan to Attorney Beckler on the Saturday preceding trial, it should be pointed out that the accusations concerning appellant Berumen dealt with the

passing of certain counterfeit $100 dollar federal reserve notes and that appellant Berumen purportedly had been given sums in excess of $100.00 by appellant Kaplan apparently as a part of a partnership purchase, prior to at least one of the alleged wrongful passings with which he was charged (See Rep. Tr. p. 239, lines 15-20; p. 265, line 19 to p. 266, line 8). Certainly, if in fact the counterfeit $100 federal reserve note in question had been given by appellant Kaplan to appellant Berumen in payment for a portion of the partnership interests, appellant Berumen could have testified to same on the stand at trial. However, it would have been a clear conflict of interest for Attorney Beckler to have permitted such testimony against his other client, appellant Kaplan. While appellants admit that the record has not, and necessarily cannot, reflect what the actual conflict in interest was, appellants submit that Attorney Beckler acquainted the court with the fact that there was such a conflict. As was stated in Glasser, supra, under such circumstances there is a clear duty on the trial judge to be certain, before permitting counsel to represent clients with potentially conflicting interests, that there is no conflict.

While admittedly the Sixth Amendment to the Constitution does not require for its satisfaction that the actions of counsel result in a favorable outcome, but rather the requirement is met whenever the accused is supplied with counsel who exercises that judgment which might be expected of one trained in law and diligent to the application of its principles, the conduct herein of Mr. Beckler leaves some question as to whether the rights of appellants

were protected. Once Mr. Beckler was acquainted with the potential conflict in question he did properly notify the court thereof and request a continuance to permit one of the appellants to obtain new counsel and thus potentially alleviate the problem. When, however, the court would only agree to continue the matter to Thursday of the week in question, Mr. Beckler then stated that he was busy on that occasion, would otherwise be occupied with other matters for most of the month of April, would prefer to go to trial on the date originally set for trial (the same day he was making his Motion for a Continuance) on the premise he could obtain and adequately prepare other counsel by that afternoon to represent appellant Kaplan and be prepared for trial at that time. Attorney Beckler made such statements after first recognizing that it might not be possible for appellant Kaplan to obtain and have other counsel prepared even by Thursday of the week in question (See Rep. Tr. p. x, lines 9-23). In light of these facts Attorney Beckler's sudden change of mind concerning the previously mentioned potential conflict may well have been more influenced by his inability to procure other counsel and commitment to other clients, than by sound reasoning and judgment.

It is submitted that under such facts appellants were denied adequate assistance of counsel and that their convictions should be reversed.

II

APPELLANTS' CONSTITUTIONAL RIGHTS WERE UNDULY PREJUDICED BY REASON OF THE TRIER OF FACT'S EXAMINATION, WITHOUT APPELLANTS' CONSENT OR REQUEST, OF CERTAIN REPORTS COMPILED BY GOVERNMENT AGENTS PERTAINING TO THE INSTANT PROSECUTION.

Under Title 18, United States Code, §3500, the defense has the right to make the demand for and receive the production of certain statements and reports of government witnesses. Sub-section (a) thereof provides that no such inspection or discovery is proper until such time as the government's witness testifies on direct examination in the trial of the case. Sub-section (b) provides:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement . . . of the witness in possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it delivered directly to the defendant for his examination and use." (18 U.S.C., §3500(b).) (Emphasis added.)

Sub-section (c) of §3500 states that if the United States makes a claim that any of the statements ordered to be produced under §3500 deal with matters not related to the subject matter of

the testimony of the witness, then the court is directed to inspect the statements and delete the objectionable portions. This section goes on to state:

> "If pursuant to said procedure, any portion of such statement is withheld from the defendant and defendant objects to such withholding, and the trial is continued to adjudication of guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event defendant appeals, shall be made available to the appellate court for the purposes of determining the correctness of the ruling of the trial judge."

Case law dealing with these so-called "Jencks Act" statements has made it clear that these statements are not to be procured until and unless counsel for defendant requests same.

> See United States v. Tellier, 255 F. 2d 441 (2nd Cir., 1958), certiorari denied, 358 U.S. 821, 79 S. Ct. 33, 3 L. Ed. 2d 62 (1958).

As was stated in Mims v. United States, 332 F. 2d 944 (10th Cir., 1964), at page 948,

> ". . . the Jencks Act provides that after a witness called by the government has testified on direct examination, the court shall, on motion of defendant, require the government to provide any statement of the witness in possession of the government which relates to the subject matter of his testimony. (citation)."

The court in Mims, supra, further held that there was no duty on the trial judge, in absence of some form of request, to have the government present such statements to the court and that the court was not a cross-examiner and strategist for the defense; the rationale of the court being that counsel for the defense might be content to rest with whatever psychological advantage cross-examination without the use of such statements might bring forth.

In the instant case it is appellants' contention that the trial judge, who was also the trier of fact, acted improperly in examining the Jencks Act statements in question, since neither appellants nor co-defendant Reinhardtsen made any motion to inspect or use such statements. Under such circumstances it is submitted that the reading of these statements, which contained substantial hearsay information and wherein it was alleged that appellants Berumen and Kaplan were felons (See United States Treasury Secret Service Treasury Department Report Form No. 1588, File No. J-4-3-CO-2344-11, dated February 2, 1965 and letter from Treasury Department to Manuel L. Real, dated January 5, 1965, bearing the aforementioned file number), was highly prejudicial.

What factually transpired in the instant trial which brought to light this error is that shortly after Agent Tomsic, Chief Prosecution Agent, took the stand on direct examination to present testimony in opposition to appellants' Motion to Suppress, and before testifying on direct examination on the substantive issues involved, counsel for all parties and the trial judge entered into the following discussion:

"MR. INMAN: May I inquire as to a separate matter of the court? Did Mr. Balaban present to the court a copy of Agent Tomsic's report?

"THE COURT: Let's see. There are three different documents here. One is a copy, I take it, of a letter addressed on the letterhead of the Treasury Department to Manual Real with a second sheet headed 'Details of Offense.'

"Now, that is one, and then there are three pages, and on the fourth page is a list of exhibits A, B, and C.

"Then there is another document which apparently is on a form and it is a report made by Robert Tomsic, and that is the Form 1588 of the United States Secret Service, Treasury Department.

"MR. INMAN: I am somewhat uninitiated in the handling of reports of this nature. Off the top of my head, your Honor, I would not think that it was proper. I would not think it proper for Mr. Balaban to have presented to the trier of fact in this particular action a copy of the Agent's report, which I have read and which contains a substantial amount of hearsay and things of this nature. Now, I really don't know what the proper procedure or practice is.

"THE COURT: Ordinarily, if it weren't for the Jencks Act, I wouldn't give any of it to you; but, anything that pertains to the Jencks Act goes to the court.

"MR. INMAN: That is the only point I have inquired about.

"THE COURT: You see, oftentimes the court has to rule on these matters as to whether or not they have been given to counsel.

"MR. INMAN: I knew that Mr. Balaban's voluntary delivery of the statements to us, which we appreciate, of course, under Jencks, is proper. I do not know whether under Jencks it was proper to give such reports to the trier of fact, your Honor.

"THE COURT: It usually goes to the trier of facts first; but, of course, the court is a trier without a jury. It doesn't change.

"MR. BECKLER: Can I address the court just in that regard, too? The only problem that is bothering me, your Honor, is that we didn't make a Jencks motion and therefore the court had no reason to rule on the admissibility of a witness' statement by virtue of 3500 US.

"THE COURT: These are merely statements for counsel to use in cross examination.

"MR. BECKLER: I understand that, your Honor, but I am wondering. When a Jencks problem arises, the court in camera usually reviews that to see which part the defense counsel will get. How about the academic problem where the question never arises?

Does the court then have the rightful authority to read these statements? I am wondering.

"MR. BALABAN: Your Honor, if I may interject one thing: Not only are the documents handed to the court for the purposes of seeing whether they should be turned over to defense counsel, but they also have to be previewed by the court in order to find out which witness the document is a statement about. In other words, the Jencks Act doesn't cover all things said about all people. At the same time I handed both defense counsel a copy, at the request of the court I handed the court a copy of the documents.

"MR. BECKLER: That is true when the Jencks problem arises, but it hasn't arisen yet and I am wondering if the court in reading these is somewhat premature. I have no motion even. I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down." (Rep. Tr. p. 159, line 17 - p. 162, line 7).

It can clearly be seen from said testimony that counsel for defendant Reinhardtsen and appellants strenuously questioned the right of the trier of fact to examine such documents without there being a Jencks Act motion made. As can be further seen from such testimony the trial judge himself apparently requested the statements and commenced reading same before either counsel

for defendant Reinhardtsen or for appellants was aware of the actions of the Court. As previously indicated the statements themselves were highly prejudicial to appellants. For example, the reference therein to appellants' respective prior criminal records is certainly a damaging reference, particularly since such information could not have been put into evidence, or used for impeachment, by the prosecution in the instant case, as appellants exercised their constitutional privilege to not testify at the trial.

See Enriquez v. United States,
188 F. 2d 313 (9th Cir., 1951).

Appellants submit that the trial judge's actions in this matter, while sitting as the trier of fact, show a clear invasion of appellants' constitutional rights and caused them to be denied a fair trial.

III

THE TRIAL COURT IMPROPERLY DENIED APPELLANT KAPLAN'S MOTION TO SUPPRESS THE SIX $100 COUNTERFEIT FEDERAL RESERVE NOTES AND ENVELOPE WHICH WERE ADMITTED INTO EVIDENCE AND WHICH SERVED AS THE BASIS OF SAID APPELLANT'S CONVICTION UNDER COUNT FIVE OF THE INDICTMENT.

As heretofore indicated a Motion to Suppress the counterfeit bills and envelope, which constituted the government's exhibits 11 through 17 which were received in evidence, was made on behalf of defendant Reinhardtsen and was joined in on behalf of appellant Kaplan. Both the affidavits filed in support of said motion and the testimony of the government's witnesses at trial showed that no warrant had ever been issued for the arrest of either of appellants or of defendant Reinhardtsen and that no warrant had ever been obtained to search the automobile in which the exhibits in question were discovered. Both the Points and Authorities and Affidavits filed in support of the Motion to Suppress clearly presented facts establishing that there was no probable cause for the arrest of defendant Reinhardtsen, nor was there any consent for the search and seizure made by the government. Evidence and authorities were also offered to the effect that the search and seizure of the automobile was not made incident to a lawful arrest, since the search in question was not contemporaneous in time to the arrest of defendant Reinhardtsen.

The government did not take issue with such evidence and

authorities, but rather took the position that the automobile in question had been properly seized under Title 49, United States Code, §781, et seq., and that under such circumstances there was a right to search said automobile at any time thereafter without the need for obtaining a warrant. In support of this position, the government at time of trial offered the testimony of Agent Tomsic who allegedly informed defendant Reinhardtsen that the Chevrolet automobile "was going to be seized as the car had been used to carry a $100 counterfeit note" (Rep. Tr. p. 174, lines 1-15).

The legal issue underlying the search and seizure in the instant case is, of course, not a new issue to this court. In Burge v. United States, 333 F. 2d 210 (9th Cir. 1964), this court concluded that under certain circumstances it would be permissible to search an automobile, which was seized as a carrier of contraband, etc., at some time after the seizure thereof and without the obtaining of a warrant to conduct such search. It was carefully illustrated in the Burge opinion that the basis for decision of the court therein was that under the facts presented that search without a warrant " . . . could not be said to be 'unreasonable' " (333 F. 2d 210, 219). The Burge decision listed two criteria which were to be used in determining whether a search without a warrant was "unreasonable". These guide lines were to the effect that (1) if there were an actual seizure the officer or officers making same must have had probable cause for believing that an automobile had been used in violation of Title 49, United States Code, §781, and that (2) the vehicle in question must from the time of seizure until the time of search be

in the lawful custody of the United States government (See 333 F. 2d 210, 218).

Examining the instant case in light of such guide lines, and conceding for the moment that the decision in Burge, supra, is applicable to the instant matter, appellants submit that the search in question was invalid. In the first instance Agent Tomsic's aforementioned testimony does not clearly establish that the automobile in question was in fact seized under the section in question and that a proper action was formerly brought to confiscate the automobile. Even if seized, however, appellants submit that Agent Tomsic had no probable cause, within the meaning of the law, for believing that the automobile was subject to seizure.

The facts in the instant case are substantially different than those which were before the court in the Burge case. In that case, which involved narcotics violations, officers had the defendant under surveilance for at least several days; they watched him drive his automobile; they saw him get in and out of it; and on one transaction the defendant was actually seen transferring narcotics to a government informer. The search in Burge, supra, was actually a search conducted to discover the whereabouts of certain marked money which the informer had paid defendant for the narcotics in question, and federal officers had been informed by another informer as to the location of said money. In the instant case it will be recalled that Agent Tomsic did have a description of the automobile in question, knew that a counterfeit note had been passed, apparently by someone who had ridden in the automobile, and that

defendant Reinhardtsen was associated with Mr. Berumen. On the other hand at the time of the alleged seizure there had been no verification that the note in question was counterfeit; no counterfeit bills had been found on defendant Reinhardtsen, although he had been searched by Agent Tomsic. Agent Tomsic was apparently not looking for, nor attempting to arrest, appellant Kaplan, although Mr. Kaplan had apparently driven defendant Reinhardtsen to the lot on the 17th when the allegedly counterfeit bill had been passed (see Rep. Tr. p. 172, line 1 to p. 173, line 19), and even though Mr. Verge, the Kirk Company employee who had originally received the allegedly counterfeit $100 note on December 17th, did not know whether defendant Reinhardtsen or appellant Kaplan had passed the note or who was driving the automobile on the 17th (see Rep. Tr. p. 51, line 19 to p. 52, line 3).

Certainly the facts in the instant case are substantially different from the quantum of evidence the government had in the Burge case. Other courts when confronted with this issue have also apparently required a more substantial quantum of evidence to establish probable cause for seizure. For example, in Drummond v. United States, 350 F. 2d 983 (8th Cir., 1965), the 8th Circuit sustained the trial court's holding that probable cause for seizure of the automobile therein had been established predicated upon the following facts:

The Drummond case dealt with counterfeiting and conspiracy to counterfeit as herein; a third party was arrested while attempting to pass a counterfeit note, and upon arrest told officers that the

accused was a source for counterfeit bills and that the accused's car had been used in delivering of said bills. This witness then went on to describe the automobile in question. Subsequently, agents arrested the accused in a restaurant pursuant to a warrant and found counterfeit bills in his pocket and then located his automobile in the restaurant parking lot, subsequently seized it, and immediately took it to the federal building where a search disclosed the counterfeit bills in question.

While the question of probable cause is certainly one which depends upon facts of the particular case, there can be no question but that the facts of the instant case provide substantially less of a basis for seizing the automobile in question than did those in Burge, supra, or Drummond, supra. It is submitted that the facts in the instant matter are not only less than those in the other cases mentioned, but are also legally insufficient to establish probable cause for the seizure in question.

Regardless of whether probable cause was in fact established for the seizure of the instant automobile, the search which was thereafter made, was clearly unreasonable and unconstitutional. In both of the leading cases dealing with this subject -- i. e. Burge, supra, and Drummond, supra -- one of the criteria which must be established to render such a search valid, is that the automobile to be searched must remain in the custody of the government from the time of seizure until time of search.

As was stated in Drummond v. United States, 350 F. 2d 983 (8th Cir. 1965),

"If the agent's version be accepted, the car's search following the seizure, when it had remained in continuous proper government custody, was not an unreasonable one within the prohibition of the Fourth Amendment. [citation]."

The court in Drummond, supra, went on to state that,

". . . because of the presence of the seizure statute and the agent's action thereto, the case [i.e. Drummond] is factually distinguishable from Preston v. U. S., 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)." 1/

In the present case the facts clearly show that the automobile in question was not in the "continuous and proper government custody" from the time of its alleged seizure until the time in which the search was made which disclosed the evidence in issue. As heretofore mentioned, after Agent Tomsic allegedly seized the automobile and made a cursory search thereof, he moved the automobile at the request of Kirk Company personnel to a spot away from the office of said company to a place somewhere near the end of the Kirk lot (see Rep. Tr. p. 174, lines 1-15). It was not until sometime after Agent Tomsic returned to his office in

---

1/ The Preston case was cited in the memorandum of points and authorities in support of the Motion to Suppress herein and stands for the proposition that even where there is a valid arrest a search of a vehicle must be reasonably contemporaneous in time with said arrest or said search will be invalid if a search warrant is not obtained therefor.

the Federal Building in Los Angeles that he allegedly gave the keys to the automobile in issue to other agents of the Secret Service and instructed them to pick up the automobile, return it to the Federal Garage, and then search it. There is no evidence in the record as to when the automobile was picked up, if it was searched, if it was taken anywhere else other than the Federal Building, or whether these agents or someone else brought the car to the Federal Building. The only other evidence offered by the government in this connection is that at some time on December 20, 1964, the day following the alleged seizure, Agent Tomsic personally searched the automobile at the Federal Garage and discovered the counterfeit bills and envelope in question. Under such circumstances it is clear that the automobile in question was not at all times in possession of the government and that access thereto could have been obtained by others. It is submitted, accordingly, that the search on December 20th was therefore improper and unreasonable.

Although this court has ruled in the Burge case that seizures of the instant nature permit searches thereafter made without warrant, appellants submit that the decision of the United States Supreme Court in Preston v. United States, supra, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964), also governs situations where seizures are made under Title 49, United States Code, §781, et seq. It is appellants' contention that even where such a seizure is made, if the search which is thereafter conducted is not reasonably contemporaneous in time (i. e. such as the day after seizure as in the instant case), then a search warrant is

required to conduct such a search of an automobile. If such a warrant is not obtained, as in the instant case, then any evidence obtained as a result of said search is illegal and not admissible.

See also:

People v. Cooper, 234 Cal. App. 2d 587 (1965).

IV

APPELLANT KAPLAN, AS A MATTER OF LAW, WAS NOT GUILTY OF AIDING AND ABETTING AS CHARGED IN COUNT 3 OF THE INDICTMENT AND AS ADJUDGED BY THE COURT.

Count 3 of the indictment charged defendant Reinhardtsen as being a principal in wrongfully passing, on December 17, 1964, a counterfeit $100 Federal Reserve Note. The indictment then reads that "[a]t said time and place defendant Bernard Kaplan aided, abetted, counseled, induced and procured a commission of the offense alleged above." The trial judge subsequently issued his judgment finding appellant Kaplan guilty of said aiding and abetting offense, although the Court first acquitted defendant Reinhardtsen from having any criminal responsibility in connection with the passing of the counterfeit note in question. Under such circumstances, appellants contend that the judgment of the trial court is legally impossible.

While it is true that one who is guilty of aiding or abetting may be punished as a principal (Title 18, United States Code, §2), there can be no question but that the offense of aiding and abetting requires that there be a principal to a crime before there can be an aider and abetter thereto.

Morgan v. United States, 159 F. 2d 85
(10th Cir., 1947);

United States v. Honeycut, 311 F. 2d 660
(4th Cir., 1962);

United States v. Johnson, 215 F. Supp. 300 (D. C. Md., 1963);

Perkins v. United States, 315 F. 2d 120 (9th Cir., 1963), certiorari denied, 375 U. S. 916, 84 S. Ct. 201, 11 L. Ed. 2d 155 (1964).

As was stated in Edwards v. United States, 286 F. 2d 681 (5th Cir., 1960):

"As the court record under this indictment charges Edwards with aiding and abetting Evans to commit the offense, it was necessary to establish the guilt of Evans as well as that of defendant Edwards.

"The basic principle of law is recognized that an aider and abettor may not be guilty of aiding and abetting a principal unless a principal did as a matter of fact commit a crime. [Citation].

"The law requires a guilty principal before the aider and abettor can be punished. [Citation]."

See also Karrell v. United States, 181 F. 2d 981 (9th Cir., 1950), certiorari denied, 340 U. S. 891, 71 S. Ct. 206, 95 L. Ed. 646 (1950);

Morei v. United States, 127 F. 2d 827 (6th Cir., 1942).

Applying these rules to the instant case it is immediately

apparent that appellant Kaplan could not have been convicted of aiding and abetting the crime charged since the alleged principal therefor was acquitted. This does not mean that appellant Kaplan could not have been "charged" as being a principal in connection with Count 3 of the indictment; however, he was not so charged. Unquestionably one who aids and abets may at the option of the pleader be indicted and prosecuted as a principal - apparently under the common law rule of lesser included offenses.

See Grant v. United States, 291 F. 2d 746 (9th Cir., 1961), certiorari denied, 368 U.S. 999, 82 S. Ct. 627, 7 L. Ed. 2d 587 (1962);

United States v. Provenzano, 334 F. 2d 678 (3rd Cir., 1964), certiorari denied, 379 U.S. 947, 85 S. Ct. 440, 13 L. Ed. 2d 544 (1965);

See also Morei v. United States, supra, 127 F. 2d 827.

This does not mean to say that one who is charged as an aider and abettor and not charged as a principal can be convicted as a principal. As heretofore indicated, the statutory provisions charging appellant Kaplan with the aiding and abetting offense only provide for punishment of an aider and abettor as a principal. There is no definitional equating of the offense of aiding and abetting to that of being a principal. Accordingly, appellant Kaplan's conviction on count 3 must be reversed.

V

THE DISTRICT COURT'S REFUSAL TO HAVE THE GOVERNMENT PRODUCE STATEMENTS MADE BY APPELLANTS AND CO-DEFENDANT REINHARDTSEN, PURSUANT TO THE MOTION OF APPELLANTS FOR THE PRODUCTION OF SUCH STATEMENTS, PREVENTED APPELLANTS FROM ADEQUATELY PREPARING THEIR DEFENSE.

As indicated in the Statement of Facts herein Judge Curtis refused, pursuant to appellants' Motion to Inspect and Discover, to require the government to produce statements made by appellants and co-defendant Reinhardtsen to officers of the government with respect to the subject matter of the instant case. Appellants submit that such statements were of manifest evidentiary importance and were essential to a proper preparation of the defense herein, particularly to enable counsel to give effective and sound advice to his clients.

See: United States v. Francher, 195 F. Supp. 448, 456 n. 17 (D. C. Conn. 1961).

Said statements also, obviously, might have given information to counsel which would have enabled him to decide whether a motion for severance should have been made on behalf of one or both of appellants.

See: Rule 14, Federal Rules of Criminal Procedure; Belvin v. United States, 273 F. 2d 583 (5th Cir. 1960).

Unquestionably, where the interests of justice and equity

dictate, production of this type of material should be compelled by the court.

See: Shore v. United States, 174 F. 2d 838 (8th Cir. 1949).

While Rule 16 of the Federal Rules of Criminal Procedure, under which this motion for discovery was made, may not specifically mention the type of material requested by appellants, appellants submit that the rule should and does include the type of material requested by appellants.

VI

APPELLANT KAPLAN WAS DENIED DUE PROCESS OF LAW

Appellants further submit that appellant Kaplan was denied his Constitutional right of due process by reason of the fact that Agent Tomsic failed to inform appellant Kaplan of his Constitutional right to remain silent and that any statement he made could be used against him on the occasion on December 20, 1964, at the Federal garage in Los Angeles, following the search and discovery by Agent Tomsic of the six (6) $100 Federal Reserve Notes in an envelope in the trunk of said automobile. It will be recalled that at this time Agent Tomsic testified that appellant Kaplan acted as though he knew that the money was hidden in the car trunk and made various other admissions which were damaging to his rights.

The testimony offered the trial by Agent Tomsic was to the

effect that he did notify appellant Kaplan that his statements could be used against him on the 19th of December at a meeting during the evening thereof (See Rep. Tr. p. 247, line 5 to p. 248, line 17). On the following day, however, when the Federal Agents possessed information which they believed to be of a serious nature concerning appellant Kaplan's involvement in the case, they had him come down to the Federal garage purportedly to pick up certain personal property, but actually to apparently see if he would do anything about the counterfeit bills which they had previously discovered in the automobile trunk (Rep. Tr. p. 251, line 24 to p. 252, line 20). It is clear that on this occasion at the Federal garage the federal agents did not caution Mr. Kaplan of his constitutional rights to remain silent, to have an attorney, and/or that any of his statements could be used against him (Rep. Tr. p. 251, line 18 to p. 253, line 7). It would appear that under said circumstances, appellant was improperly cautioned by the Federal agents and that all of such testimony should have been inadmissible against him as he had been denied due process within the meaning of the Fifth Amendment to the United States Constitution.

See: Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

CONCLUSION

Wherefore appellants respectfully submit that their convictions be reversed and that the instant matter be remanded to the District Court.

Respectfully submitted,

ALEXANDER, INMAN & FINE

By: MAURICE C. INMAN, JR.

GARY GOLDMAN

Attorneys for Appellants.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the within brief fully complies therewith.

/s/ Maurice C. Inman, Jr.

MAURICE C. INMAN, JR.